No. 18410

In the

United States Court of Appeals

For the Ninth Circuit

ARCHIE K. BABSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from No. 38337 in the United States District Court, Northern District of California, Southern Division.

APPELLANT'S BRIEF

JAMES W. HEYER
Tower Building
1700 Broadway
Denver 2, Colo.

Attorney for Appellant

American Brief Co., 1817 Mills Tower,
San Francisco, Calif. YUkon 2-2026.

I N D E X

SUBJECT INDEX

Page

No. 18,410

In the

United States Court of Appeals

For the Ninth Circuit

ARCHIE K. BABSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from No. 38337 in the United States District Court, Northern District of California, Southern Division.

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

Appellant was charged by an indictment alleging in Count One an unlawful conspiracy in violation of 18 U.S.C.A. §371, and twenty additional substantive counts of mail fraud in violation of 18 U.S.C.A. §1341. (Transcript of Record, pp. 3-23.)

Appellant was tried, together with co-defendants, Lillian K. Babson, Gordon L. Braden and Victor J. Trial, commencing September 10, 1962, in the United States District for the Northern District of California, Southern Division, the Honorable William T. Sweigert, United

(R.T. 1077 ff.) Babson instructed them at sales meeting to avoid misrepresentation (R.T. 869), to lay emphasis on the industry's future (R.T. 405), the rewards offered by the course (R.T. 400-401), and to use his technique of "negative selling" (R.T. 399-400; 853-854).

The evidence disclosed that approximately 1400 students were ultimately enrolled (R.T. 1616). Periodic classroom instruction was given (R.T. 1623-26) and the Institute had several jet engines available for demonstration (R.T. 1622). Subsequent evaluation disclosed that the training offered by the school was in fact not adequate to qualify a student without prior experience to obtain a job as a supervisor or inspector after graduation (R.T. 749), although the course was of some value and a properly qualified student might obtain such a job. (R.T. 747.)

Testimony established that a mere mechanic would not make $1,000 to $1,200 per month, although a supervisor might (R.T. 912), and that the airlines ultimately would not honor the school. However, during the initial months of the operation of the school, the airport officials were "very impressed" (R.T. 746), and government's witness Porter, who designed the course,drafted the lessons and was Director of Training,

thought the school was a "terrific idea" (R.T. 747).

The appellant testified he formed the school as a result of learning from articles and newspaper advertisements that a great need existed in the industry for trained personnel in the jet engine field. Although appellant had only the equivalent of a high school education (R.T. 1553), he had previous experience and success in the correspondence school field (R.T. 1554). He testified that he had checked the qualifications of Porter, felt that was well suited to prepare the lessons and act as Director of Training, and that he relied completely upon him. (R.T. 1557-1564, 1592.)

Appellant admitted that he was in charge of the sales program but denied making or authorizing any of his salesmen to make any misrepresentations or false promises (R.T. 1587).

No complaint of error is made herein with respect to the admissability of any testimony or exhibits, but the appellant asserts that the evidence was insufficient to establish a conspiracy and failed to show any criminal intent on his part. In addition, certain questions are raised concerning errors in the supplemental instruction given by the Court;

and a statement of facts concerning these matters is set forth in the argument.

SPECIFICATION OF ERRORS

The appellant relies on the following specifications of error in urging reversal of his convictions:

1. THE GOVERNMENT FAILED TO PROVE THAT A CONSPIRACY EXISTED AS CHARGED IN COUNT ONE OF THE INDICTMENT.

2. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH ANY CRIMINAL INTENT ON THE PART OF APPELLANT, AND THE COURT ERRED IN REFUSING TO GRANT HIS MOTION FOR JUDGMENT OF ACQUITTAL ON ALL COUNTS.

3. THE COURT'S FAILURE TO INSTRUCT THE JURY AFTER THE ARGUMENTS OF COUNSEL, AS REQUIRED BY RULE 30 F.R.C.P., RESULTED IN PREJUDICIAL ERROR.

4. THE TRIAL COURT ERRED IN ITS SUPPLEMENTAL CHARGE TO THE JURORS BY FAILING TO ADMONISH THEM THAT SUCH CHARGE MUST BE CONSIDERED ONLY IN RELATION TO THE OTHER INSTRUCTION ORIGINALLY GIVEN.

5. THE COURT ERRED BY PERMITTING THE JURY TO DELIBERATE IN PUBLIC.

ARGUMENT

1. THE GOVERNMENT FAILED TO PROVE THAT A CONSPIRACY EXISTED AS CHARGED IN COUNT ONE OF THE INDICTMENT.

A conspiracy is an agreement by two or more persons to commit a crime or accomplish an unlawful purpose. The offense charged in Count One of the indictment is that the appellant combined with others for the purpose and with the intent and agreement to deliberately violate 18 U.S. S.A. §1341, by using the mails in furtherance of a scheme to defraud.

The essence of a charge of conspiracy is the agreement, and it is elementary that proof of the existence of an agreement, express or implied, is required to sustain the charge. Further, in a charge of mail fraud conspiracy, it is necessary to prove as additional elements that the object and purpose of the agreement was 1) a scheme to defraud, and 2) with intent to use the mails to effect the scheme. Mazurosky v. United States (9 Cir. 1939) 100 F. 2d 958.

Appellant submits that the evidence wholly failed to show the existence of any such agreement in this case, and in the absence of such proof, the conviction on Count One cannot be sustained. It is true that the salesmen employed by

appellant had a common purpose to sell the correspondence course of the Institute, and that they sometimes made similar representations to prospective students concerning positions available in the jet industry and the ability of the Institute to train them to secure such positions. However, mere similarity of conduct of the defendants and alleged co-conspirators, and the fact that they associated with each other, assembled together and discussed common aims, interests, and sales patterns does not necessarily establish the existence of a conspiracy. Harris v. United States (9 Cir. 1958) 261 F. 2d 792; United States v. Schneiderman (S.D. Cal. 1952) 106 F. Supp. 906.

The government relies upon the similarity in representations and pattern of conduct by the various salesmen employed by appellant to prove a scheme to defraud; but such evidence alone cannot amount to an agreement in support of the charge of conspiracy. To rely solely upon the cooperative action of the various defendants in selling courses of the Institute as proof of a conspiracy and the necessary ingredient of an agreement, makes the criminal object of the conspiracy the very conspiracy charged. Under such circumstances, conspiracy cannot be sustained. Gebardi v. United States 287 U.S. 112, 53 S. Ct. 35.

2. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH ANY CRIMINAL INTENT ON THE PART OF APPELLANT AND THE COURT ERRED IN REFUSING TO GRANT HIS MOTION FOR JUDGMENT OF ACQUITTAL ON ALL COUNTS.

A charge of conspiracy has implicit in it the elements of knowledge and intent, Schnautz v. United States (5 Cir. 1959) 263 F. 2d 525, and it has long been established that a conscious knowing intent to defraud is an essential element of the substantive charge of using the mails to defraud. Durland v. United States 161 U.S. 306, 16 S. Ct. 508; United States v. Kyle (2 Cir. 1958) 257 F. 2d 559.

Representations and promises are not criminal unless made with fraudulent intent; and an honest belief in the truth of representations made, and good faith in one's hopes and expectations of fulfilling promises made is a complete defense to the crimes charged in the indictment. Harris v. United States (9 Cir. 1958) 261 F. 2d 792.

There is competent and convincing evidence in this case which shows that appellant had reasonable grounds for an honest belief in the merit of his Institute and the hope of fulfilling the representations made. His course of conduct was not marked by a reckless indifference, but by reliance upon the

qualifications of Porter, author of the course, and the truth of the various articles read by him concerning the industry demand for jet technicians. The question is not whether it was possible for appellant to do the thing that he promised, but whether or not he honestly and in good faith intended to do so.

There was insufficient evidence of unlawful criminal intent on the part of appellant to submit this case to the jury, and the trial court should have granted a judgment of acquittal on all counts at the conclusion of the evidence.

3. THE COURTS FAILURE TO INSTRUCT THE JURY AFTER THE ARGUMENTS OF COUNSEL, AS REQUIRED BY RULE 30, F.R.C.P., RESULTED IN PREJUDICIAL ERROR.

The trial judge instructed the jury on the law of the case prior to the summations of counsel (R.T. 1655-1678). The reason for this is not entirely clear from the record; but it appears that the evidence was concluded at about 12:20 P.M. on October 1, 1962 (R.T. 1654), that counsel were not entirely prepared to commence their summations during the afternoon session and desired to conclude all arguments in one day, and that it was the usual practice of the trial judge to give "some sort of instructions" before argument by counsel (R.T. 1653). In apparent

deference to counsels' desire to present all the summations in one day, the Court directed arguments to commence the following morning; however, it is evident that the judge did not wish to waste the afternoon session on October 1, 1962, and he delivered his instructions to the jury following the noon recess (R.T. 1656). Opportunity was afforded counsel to make objection to errors and omissions in the instructions as given, and none were noted (R.T. 1678), nor was any objection made to the fact that the instructions on the law were given prior to the arguments of counsel (R.T. 1679). On the following morning the summations were made and completed after which the Court gave a closing instruction (R.T. 1681-1684) that explained the forms of verdict (R.T. 1684-1686) but did not repeat the instructions given before the arguments (R.T. 1681). There were no corrections, objections or suggestions for additional instructions by counsel (R.T. 1687) and the jury retired to deliberate at approximately 2:00 P.M. on October 2nd (R.T. 1688).

Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides as follows:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably

directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." (Emphasis supplied.)

The purpose of Rule 30 is to give the trial court the opportunity to present the case to the jury with complete fairness to the parties and after full consideration of their claims as to their theories, the law, and the facts applicable. Marson v. United States (6 Cir. 1953) 203 F. 2d 904. Moreover, the rule directs that the law of the case shall remain first and foremost in the minds of the jurors, and the last words heard

by them should be the impartial charge of the judge rather than the impassioned pleas of counsel. 25 Va. L. Rev. 261.[1]

Prior to the effective date of Rule 30 on March 21, 1946, the Court of Appeals for the District of Columbia had more than one occasion to consider situations where the court's charge to the jury was, in effect, given prior to the arguments of counsel. Copeland v. United States (C.A.D.C. 1945) 152 F.2d 769; Medley v. United States (C.A.D.C. 1946) 155 F.2d 857. In both of these cases, counsel had read certain instructions given to the jury which the court, after argument, merely ordered to be followed. The Court of Appeals in each instance disapproved the reading of instructions by counsel and commented upon the salutary effect which Rule 30 would have. Later, when this rule became effective, the same court in Wheeler v. United States (C.A. D.C. 1953) 211 F.2d 19, considered the same question and held that since the language of Rule 30 unequivocally

---

1. A commentary upon the notes of the Advisory Committee concerning the same language of Rule 51, Federal Rules of Civil Procedure, 18 U.S.C. A., from which Rule 30 of the Federal Rules of Criminal Procedure was adopted.

directed that "the court shall instruct the jury after the arguments are completed," the practice of allowing instructions to be read by counsel was clearly prohibited by the rule.

This Circuit has expressed its view concerning the need for strict compliance with the provisions of Rule 30. Enriquez v. United States (9 Cir. 1951) 188 F.2d 313. In that case the appellant had failed to observe Rule 30 because although he had voiced objection to a proposed instruction, he did not repeat his objections nor request any limitation on the applicability of the instruction after it was given by the court. This Court stated at page 316, that:

> "Rule 30 is not designed as a mere trap for the unwary. Painstaking compliance with its requirements although not an easy matter for the lawyer is of the very essence of the orderly administration of criminal justice."

Such standard of compliance is perhaps even more difficult for the trial judge, but in the best interests of the orderly administration of justice the standard cannot be lowered. "Rule 30 is clear and unambiguous and its application is not dependent upon the personal

whims of the Court . . . This rule which has the force of law leaves no area in which it may be disregarded . . ." Herzog v. United States (9 Cir. 1955) 226 F.2d 561, 569.

No objection was made to the trial judge's adopted habit of instructing the jury before arguments of counsel, and the initial instructions adequately and fairly presented the law of the case from the standpoint of both parties. This is apparent from the absence of objection by the capable counsel who tried the case; but there was no need for counsel to object to "any portion of the charge or omission therefrom." The objectionable feature was the delivery before argument; and we submit that compliance with the rule was not and cannot be waived by any agreement or failure to object by counsel.

Had it not been for the supplemental charge by the court, which was give 7-1/2 hours after the jury commenced its deliberations, this departure from procedure might not have resulted in prejudicial error. However, the giving of additional instructions, favorable to the prosecution, at a time when those favorable to the appellant had been delivered 32 hours earlier, was of special significance to appellant. The standard instructions, which the court refused to

repeat for the appellant, were by then so remote in the minds of the jurors, that the risk of substantial prejudice was present. If the court had delivered its initial instructions at the proper time, and reminded the jury to consider the additional instructions with those previously given, no such risk would have been encountered.

Appellant contends that the giving of instructions on the law prior to arguments by counsel was "plain" error under Rule 52(b) of the Federal Rules of Criminal Procedure, and is apparent on the face of the record. Furthermore, in this case, the error was prejudicial and substantially affected the rights of appellant, in view of the limited nature of the Court's supplemental charge.

4. THE TRIAL COURT ERRED IN ITS SUPPLEMENTAL CHARGE TO THE JURORS BY FAILING TO ADMONISH THEM THAT SUCH CHARGE MUST BE CONSIDERED ONLY IN RELATION TO THE OTHER INSTRUCTIONS ORIGINALLY GIVEN.

Seven and one-half hours after their deliberations had begun, the jury was returned to the court room, and the foreman presented the following written request to the Court: "Jury would like to have instructions again on law pertaining to conspiracy" (R.T. 1688). The law

pertaining to conspiracy related only to Count One of the indictment, but the judge apparently without consultation with counsel, proceeded to repeat the instructions on "aider and abettor" which related only to the substantive counts charging mail fraud (R.T. 1688, 1689), although the jury had made explicit the single area of difficulty. Thereafter, the Court again read the statute on conspiracy and repeated the other instructions previously given on the law relating to conspiracy (R.T. 1689-1691).

There was apparent confusion among the jurors as to the meaning of the supplemental instructions given by the Court, because after the jurors were permitted to confer among themselves in the court room (R.T. 1692) the foreman propounded an additional inquiry: "On the element of conspiracy, whether there must be applied to each one of these specific counts in the indictment?" (R.T. 1693.) The Court clarified this problem but refused to instruct again upon "reasonable doubt" and other instructions favorable to the defendants, although specifically requested to do so (R.T. 1695, 1696); nor did the Court grant the equivalent by admonishing the jury that the additional instructions must be considered only in connection with all instructions previously given (R.T. 1696).

The giving of additional instructions to supplement the original charge is a matter within the discretion of the trial court, Allen v. United States (9 Cir. 1951) 186 F.2d 439. However when a jury makes explicit its difficulties, a trial judge who undertakes to give additional instructions should clarify the problem with concrete accuracy, Bollenbach v. United States 326 U.S. 607. No rule requires a court to review all of the evidence or to repeat all of the instructions, Allis v. United States 155 U.S. 117, 15 S. Ct. 36, but the jurors must not be permitted to single out one of the court's instructions as stating the law. They must be admonished to consider the instructions as a whole. United States v. Schneiderman (S.D. Cal. 1952) 106 F. Supp. 906.

When supplemental instructions are given to encourage an agreement among jurors (the so-called "Allen" instruction) or on some other matter of procedure, it is not necessary to re-state the law on presumption of innocence, burden of proof, and reasonable doubt. Redfield v. United States (9 Cir. 1961) 295 F.2d 249, affirming 197 F. Supp. 551; Orton v. United States (4 Cir. 1955) 221 F.2d 632. However, where the supplemental instructions repeat a statute or a point of law favorable to the government, the trial judge should repeat instructions

favorable to the defendant. Bland v. United States (5 Cir. 1962) 299 F.2d 105. In Berger v. United States (10 Cir. 1932) 62 F.2d 438, where certain evidence was reviewed in a supplemental charge, the Court held that the trial judge should have again called the jury's attention to the presumption of innocence, the burden of proof and the requirement that guilt be established beyond a reasonable doubt. Later, the same Court of Appeals held in Speak v. United States (10 Cir. 1947) 161 F.2d 562, that (in lieu of repeating such principles) the trial court should at least grant the equivalent by making reference to and instructing the jurors to be guided by all instructions originally given.

Thus, when supplemental instructions are given relating to the evidence or law of the case and not merely to encourage agreement, the Court should admonish the jury that the additional instructions must be considered only in connection with all instructions previously given. Particularly this is so when the repeated portion of the charge has dealt with a point favorable to the government. State v. Shinovich (1929) 40 Wyo. 174, 276 P. 172; Pless v. State (1912) 102 Ark. 506, 145 S.W. 221; 23A C.J.S. Criminal Law, §1376, p. 1003.

It would not be error to omit repeating the principles favorable to the defendant where counsel assented to the procedure or where no objection was made to the limited instructions given. However in this case, we submit that it was error to refuse the request of defense counsel to repeat certain instructions favorable to appellant, or to at least grant the equivalent by cautioning the jury to consider the additional instructions only in relation to all instructions previously given.

The prejudice to the accused is apparent since the original instructions had been given many hours earlier on the previous day and were obviously not fresh in the minds of the jurors. If their memory needed refreshing as to the meaning of a conspiracy, it can be fairly be inferred that the significance of other instructions explaining the requirements of proof and defining "reasonable doubt" and "presumption of innocence" had also by then eluded the minds of the jurors.

5. THE COURT BELOW ERRED BY PERMITTING THE JURY TO DELIBERATE IN PUBLIC.

After the supplemental instructions were given to the jurors, the Court instructed them to confer among themselves

informally to determine whether there was anything further they wished (R.T. 1692). The jury then proceeded to confer in open court for a period of time in the presence of counsel, the parties, court attaches and such other witnesses and interested members of the public as were then present. This procedure was objected to (R.T. 1692).

The deliberations of a jury must be secret and even the presence of an alternate juror or an officer of the court during their deliberations is improper. People v. Knapp 42 Mich 267, 3 N.W. 927. The purpose of the privacy rule is to provide each juror with an occasion to comment with freedom and express the beliefs and inquiries which he might be reluctant to do in public. Private and confidential discussion cannot be held by jurors in open court in the presence of court employees, counsel, litigants and strangers, and the presence of a single other person in the presence of a single other person in the room is an intrusion upon this privacy.

We do not know what the jurors talked about in this case. They may even have taken a poll as to the guilt of appellant on one or more counts; but the presence of others, including the defendants, must have operated to some

extent as a restraint upon their proper freedom of expression.

The trial judge, in effect, told the jurors that they should then and there openly discuss and reveal any areas of difficulty. This we submit was improper and constituted error for two reasons.

First, one or more of the jurors may have desired to have certain defense instructions repeated after hearing the supplemental charge; but only a rare juror would argue or insist upon the need therefor in the embarrassing presence of the parties in interest.

Secondly, an instruction that the jury engage in open conference and make a spontaneous determination as to whether further problems exist, carries an implication that no later consideration of such matters should be engaged in by them in the privacy of their deliberation room. This implication could forever silence a juror who was reluctant to express his views or doubts in open court.

Respectfully submitted,

JAMES W. HEYER

Tower Building,
1700 Broadway,
Denver 2, Colorado

Attorney for appellant.